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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

CHIN-TEH SHIH, AS TRUSTEE FOR THE WOO FAMILY 2000 TRUST, et al., **Plaintiffs and Cross-Appellants,** **v.** **ERIC W. LIEN et al.,** **Defendants and Appellants.**	**A132471** **(San Francisco County Super. Ct. No. CGC09487145)**

Eric W. Lien and Pi-Ching Yen (Lien/Yen) appeal from the dismissal of their cross-complaint, contending the court erred in concluding that their claims were barred by the statute of limitations (Code Civ. Proc., § 337) and res judicata.

In their cross-appeal, Chin-Teh Shih, as Trustee for the Woo Family 2000 Trust, and Lucky United Properties Investments, Inc. (Shih/Lucky), appeal from the dismissal of their complaint, contending the court erred in sustaining a demurrer without leave to amend on the ground their breach of contract claims were barred by the statute of limitations. (Code Civ. Proc., § 337.)

We will reverse the judgment in part, because the court erred in sustaining the demurrer to one of the causes of action in the complaint. The judgment will otherwise be affirmed, with a modification explained *post*.

I. FACTS AND PROCEDURAL HISTORY[1]

In 1996, Ming (or Frank) Woo and appellants Eric W. Lien and Pi-Ching Yen purchased 10 undeveloped lots in San Francisco's Bernal Heights neighborhood for $178,000. For the sake of convenience, title was taken by respondent Lucky United Properties Investments, Inc. (Lucky), a corporation owned solely by Woo. The parties agreed that: Woo would contribute $67,500 for a 37.5 percent share in the property; Woo would loan to Lien $67,500, which Lien would use to acquire a 37.5 percent share; and Yen would contribute $45,000 for a 25 percent share.

The purchase agreement, signed by Woo, Lien and Yen in December 1995, stated in part: "Lien accepted the co-ownership arrangement with the understanding, that since all Lien's purchase money comes from loan(s), that Lien desires to repay the loan as soon as possible . . . from the sale of the lot or lots." The agreement gave Lien the right to sell the property for an amount that exceeded a 25 percent annual return on the original purchase price, subject to a right of first refusal granted to Woo. Under the right of first refusal, if a third party made an offer to purchase the property, Woo would have the right to purchase on the same terms.

Within a few months, the City and County of San Francisco improved access to portions of Bernal Heights, increasing the property's value. Between 1998 and mid-1999, the parties received several offers to sell the property but could not agree on a sale. Although no sale occurred, Woo asked Lien to repay him the money he had contributed on Lien's behalf; Lien declined.

From 1999 through the present, the parties have been embroiled in litigation. Fundamental to this appeal are three cases in San Francisco Superior Court: case number 305809, case number 454501, and the present action, case number 487145.

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[1] Like the parties, we take the background facts primarily from three of our prior unpublished opinions in the numerous appeals the underlying dispute has spawn: *Woo v. Lien* (Oct. 2, 2002, A094960); *Shih v. Lien* (June 12, 2008, A114380); and *Shih v. Lien* (Aug. 11, 2011, A128525).

A. *August 1999: Litigation by Woo/Lucky; Lien/Yen Cross-Complaint (305809)*

The first of numerous lawsuits between the parties was commenced in August 1999 and was litigated for over a decade. We discuss the proceedings to the extent they are germane here.

1. *Woo/Lucky's Initial Complaint*

In August 1999, Woo and Lucky sued Lien and Yen for breach of contract, declaratory relief, and specific performance. As to the breach of contract claim, it was alleged that Lien had breached the Woo-Lien note by failing to repay Woo the $67,500 loan on demand. A declaratory judgment was sought in regard to the parties' respective rights and obligations regarding the property. The specific performance claim against Lien related to an attempt by Woo to purchase Lien's interest in the property.

2. *Cook's Offer and Woo's Purported Exercise of Right of First Refusal*

Matters took a critical turn when, in October 1999, an offer was made by Christopher Cook to purchase the property for $675,000. Lien/Yen accepted Cook's offer and forwarded it to Woo, requesting that Woo either accept the offer or exercise his right of first refusal.

On December 13, 1999, Woo sent a letter through his attorney stating that he was exercising the right of first refusal to purchase the property for $675,000, subject to various conditions. One of those conditions was that opening escrow was unnecessary since title already resided in Lucky. Another condition was that Woo would deduct from the $675,000 purchase price the five percent ($33,750) brokerage commission.

On December 14, 1999, Lien, through his attorney, rejected Woo's attempt to exercise his right of first refusal. Lien's attorney stated that an escrow was required to be opened for the right to be properly exercised. He also stated that in order for Lien/Yen to be in the same position as if Cook had purchased the property, Woo and Lucky should agree to indemnify Lien/Yen against any possible suit by the brokers related to the brokers' commissions. Woo did not respond. Thus was born the question of whether Woo had properly exercised his right of first refusal.

3. *Lien/Yen's Cross-Complaint Alleging Woo's Failed Exercise and Their 62.5% Interest*

On January 6, 2000, Lien/Yen filed a cross-complaint against Woo and Lucky alleging claims for resulting trust, declaratory relief, specific performance, breach of contract, partition, violation of Business and Professions Code section 17200, and interference with prospective economic advantage. The cross-complaint alleged that Woo and Lucky refused to allow the Cook sale to proceed, and failed to validly exercise the right of first refusal to match the terms of Cook's offer. It asked the court to either declare that Lien/Yen together owned a 62.5 percent interest in the property and partition the property, or order Woo and/or Lucky to purchase the property for $675,000, with Lien and Yen to be paid their respective shares. The cross-complaint also sought damages and restitution.

4. *Woo/Lucky's Amended Complaint for Rescission, Declaration of Valid Exercise*

In June 2000, Woo and Lucky filed an amended complaint against Lien and Yen. The first five causes of action sought rescission or damages on several grounds. The sixth cause of action sought a judicial declaration that Woo validly exercised his right of first refusal to purchase the property for $675,000. In essence, if Woo was not entitled to rescission of the entire transaction, he wanted the court to declare that the price he offered to pay to exercise his right of first refusal was correct.

5. *March 2001 Judgment*

The matter proceeded to a court trial before Judge Chaitin. In March 2001, judgment issued in Lien/Yen's favor on all of the causes of action alleged in Woo/Lucky's amended complaint (including the sixth cause of action seeking a declaration that Woo validly exercised his right of first refusal) and on all of the causes of action alleged in Lien/Yen's cross-complaint (including that Woo failed to validly exercise his right of first refusal). The trial court concluded that Woo/Lucky's claims for rescission of the original agreement were meritless, Woo had *not* effectively exercised his

right of first refusal, and Lien/Yen were entitled to a resulting trust and equitable relief involving the sale of the property.

Subsequently, the trial court awarded Lien/Yen costs and attorney fees under Civil Code section 1717.

Woo/Lucky appealed from the March 2001 judgment (A094960) and the attorney fee award (A096145).

6. *October 2002 Appellate Reversal as to Woo's Exercise*

On October 2, 2002, this court affirmed the trial court's ruling on Woo/Lucky's first five causes of action for rescission and damages, but reversed and remanded on the issue of whether Woo had exercised his right of first refusal in December 1999. (*Woo v. Lien* (Oct. 2, 2002, A094960) [nonpub. opn.].) We also reversed the trial court's judgment on Lien/Yen's cross-complaint, which was based on the trial court's erroneous determination that Woo did not validly exercise his right of first refusal. We concluded that neither side was the prevailing party in the appeal and that each side should bear its own costs on appeal.[2]

On October 3, 2002, we reversed the trial court's attorney fees and costs award to Lien/Yen based on our determination that there was no prevailing party. (*Woo v. Lien* (Oct. 3, 2002, A096145) [nonpub. opn.].)

7. *2004-2005 Lien/Yen's Lis Pendens on the Property*

In November 2004, Lien and Yen recorded a lis pendens on the property. Then, according to appellants, "Woo died at the beginning of 2005 and respondents [Chin-The Shih, as Trustee for the Woo Family 2000 Trust (Shih) and Lucky] succeeded to his interests." At respondents' request, the court (Judge Warren) expunged the lis pendens in October 2005.

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[2] We first issued our decision in August 2002, stating the amount Woo owed Lien and Yen under the exercise. However, we granted rehearing on our own motion and issued a new opinion on October 2, 2002, deleting the finding as to the amount due Lien/Yen and remanding the matter for further proceedings as to Lien/Yen's affirmative defenses to Woo's purported exercise.

8. *December 2005 Judgment in Woo's Favor Establishing Valid Exercise*

After remand, a court trial was held on Lien/Yen's affirmative defenses to Woo/Lucky's claim in their sixth cause of action that Woo exercised his right of first refusal in December 1999.

On December 12, 2005, the trial court (Judge Mellon) ruled that Lien/Yen failed to establish an affirmative defense and entered judgment in Woo/Lucky's favor on the sixth cause of action. As to Woo's first five causes of action, the court carried through the prior ruling in favor of Lien/Yen.

As to Lien/Yen's cross-complaint, the court now ruled against Lien/Yen, including on their causes of action for declaratory relief (in which they sought to establish a continuing 62.5 percent interest in the property) and partition. The trial court explained that, since we determined in appeal number A094960 that the court's prior ruling on Lien/Yen's cross-complaint had to be reversed because it was based on the finding that Woo had not validly exercised his right of first refusal, the court's new resolution that Woo *had* validly exercised his right of first refusal "precludes any consideration by this court of the merits of any cause of action set forth in the cross-complaint."

No appeal was held as to the December 2005 judgment.

9. *Letter from Woo/Lucky's Counsel to Lien/Yen's Counsel*

On December 21, 2005, Mattaniah Eytan (counsel for plaintiffs Woo, Shih and Lucky in the trial court and respondents/cross-appellants here) sent a letter to Albert Lee (at the time, counsel for Lien/Yen), proposing an "accounting" and representing that, "[a]fter any appeal is over, assuming plaintiffs prevail, plaintiffs expect to pay whatever sums the parties agree are due and owing, or whatever a court determines they owe." Lien/Yen now argue that this and similar statements caused them to defer commencing new litigation to compel payment of the amount due them under the exercise contract formed by Woo's purported exercise of his right of first refusal, which the court had now ruled to be valid.

10. *Prevailing Party Determinations*

Thereafter, the parties each sought to be declared the prevailing party entitled to contractual attorney fees and costs under the original agreement. (Civ. Code, § 1717; Code Civ. Proc., § 1032.)

In an April 2006 order, the trial court (Judge Mellon) declared Woo the prevailing party for the period from the remittitur in December 2002 through the trial that had commenced in November 2005, awarding Woo $440,000 in attorney fees and $13,224.22 in costs. In June 2008, we reversed and remanded the matter to the trial court with instructions to determine the prevailing party, if any, based on the final results of the litigation as a whole. (*Shih v. Lien* (Jun. 12, 2008, A114380 [nonpub. opn.].)

By order of March 30, 2010, the trial court (Judge Ulmer) determined there was no prevailing party based on the final results of the litigation for purposes of awarding attorney fees and costs. We affirmed. (*Shih v. Lien* (Aug. 11, 2011, A128525) [nonpub. opn.].)[3]

B. *July 2006: Lien/Yen's Quiet Title Action, Shih/Lucky's Cross-Claim (454501)*

In March 2006 – the court having decided in December 2005 that Woo *had* effectively exercised his right of first refusal – Woo's company Lucky (which possessed record title to the property) sold the property for $1.75 million to a purchaser named Salvio Street, without Lien/Yen's knowledge. Lien and Yen thus mounted a new attack in July 2006: a complaint against Lucky, Shih, and Salvio Street in superior court case number 454501, commencing a second set of cross-actions between the parties.

1. *Lien/Yen's Complaint to Quiet Title As to a 62.5% Interest*

In their complaint, Lien and Yen again sought a judicial determination that they collectively owned a 62.5 percent interest in the property. This time they asserted: Woo's exercise of his right of first refusal had created a bilateral contract necessitating that Lien/Yen perform by conveying their interest to Woo; no conveyance by Lien/Yen

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[3] We ruled: "Viewing the substance rather than the form of this long and tortured litigation and taking into account equitable concerns, we conclude the trial court did not abuse its discretion in denying the contractual attorney fees to both sides."

had occurred; and Lien/Yen therefore still owned their interests in the property. In addition to a judicial declaration as to their ownership interest, Lien/Yen asked that the property be partitioned accordingly.

2. *Shih/Lucky's Cross-Complaint and Sustained Demurrer*

In September 2006, Shih/Lucky filed a cross-complaint against Lien/Yen, seeking an accounting and claiming both anticipatory breach and actual breach of the exercise contract. Shih/Lucky contended that Lien/Yen breached by denying the effectiveness of Woo's exercise, denying the existence of the exercise contract, and blocking the sale of the property.

Lien/Yen demurred to the cross-complaint, asserting among other things that Shih/Lucky's causes of action for anticipatory breach and actual breach were time-barred.

In December 2006, the court overruled Lien/Yen's demurrer as to the accounting claim, sustained the demurrer without leave to amend as to the anticipatory breach claim, and overruled the demurrer as to the claim for actual breach.

3. *Summary Judgment Against Lien/Yen on Their Complaint*

Shih/Lucky then moved for summary judgment on Lien/Yen's complaint, contending that Lien/Yen's claims were barred by res judicata in light of the December 2005 judgment rejecting Lien/Yen's cross-complaint in case number 305809 – in which Lien/Yen had sought partition and a declaration that they possessed a 62.5 percent interest in the property.

The trial court granted the summary judgment motion in May 2007, ruling as follows: "Res judicata bars relitigation of quiet title and partition claims against defendants [Shih/Lucky]. In any event, defendants no longer have a claim to any interest in the subject real property so quiet title and partition claims cannot proceed against them." The trial court ruled, however, that Shih and Lucky were not entitled to attorney fees based on provisions in the original agreements between Woo, Lien and Yen.[4]

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[4] The court also granted summary judgment for Salvio Street, on the ground that Salvio Street took title after the trial court had expunged the lis pendens that Lien/Yen had filed, and a purchaser for value after an expungement order takes without notice of

4. *The Parties' Stipulation*

In June 2007, the parties entered into a "Stipulation for Voluntary Dismissal of Woo's Cross-Complaint and Joint Request for Entry of Final Judgment as to Lien's Complaint." The purpose of the stipulation, ostensibly, was to allow Lien/Yen to appeal immediately the summary judgment decision in favor of Shih/Lucky as to Lien/Yen's complaint. In this stipulation, Shih/Lucky (referred to therein as Woo) agreed to the dismissal of Woo's claims without prejudice to reasserting them later in a new action. Lien agreed, however, that: "Lien waives statute of limitations or any other defenses based on the time interval between the dismissal of the cross-complaint and the filing of a new action, and agrees the new action by Woo will be treated by Lien as if the cross-complaint had been stayed rather than dismissed and as if the new action by Woo were identical in all material respects with the Woo cross-complaint." The parties further stipulated: "Neither Woo nor Lien may claim . . . any res judicata or similar issue preclusion benefit in any further proceedings from the voluntary dismissal of the cross-complaint."

Judgment was entered. Lien/Yen appealed the dismissal of their complaint. Shih/Lucky appealed the order denying their request for attorney fees.

5. *Affirmance*

We affirmed the trial court. (*Lien v. Lucky United Properties Investments, Inc.*, Nov. 26, 2008, A118698, A120068 [nonpub. opn.] (*Lien v. Lucky*).)

As to the res judicata issue, we ruled that Lien/Yen's claims to establish a 62.5 percent interest in the property was barred by the December 2005 judgment in case number 305809, in which their cross-complaint sought a declaration and partition as to 62.5 percent of the property. We stated: "In the present suit, Lien and Yen filed causes of action seeking a declaration that together, they owned a 62.5 percent interest in the Joy Street property and partition. Lien and Yen alleged the same causes of action in their prior cross-complaint. The court's December 12, 2005 judgment rejecting Lien and

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any ownership claim of the proponent of the lis pendens (Code Civ. Proc., § 405.61). (*Shih v. Lien*, A118698, 120058.)

Yen's causes of action for declaratory relief and partition is both final, (Lien and Yen abandoned their appeal challenging it) and was on the merits. Indeed, prior to rejecting those causes of action, the court conducted not just one, but two trials. Finally, the parties against whom the doctrine is being asserted, Lien and Yen, were the same parties in the prior action. We agree with the trial court and conclude all the requirements for applying the doctrine of res judicata are present." (*Lien v. Lucky, supra,* A118698 at p. 5.)

In reaching this decision, we rejected Lien/Yen's argument that the prior judgment in case 305809 was not on the merits. We also found unavailing their argument that Woo's exercise of his right of first refusal had created an executory purchase contract that required their performance, because the legal consequences of Woo's right of first refusal and its effect on the parties' ownership interests had been issues in case number 305809, in which a final judgment had already been reached. (*Lien v. Lucky, supra,* A118698 at p. 6.) We added: "When the trial court rejected Lien and Yen's cross-complaint in which they sought to establish that they owned a 62.5 percent interest in the property, it effectively ruled Lien and Yen did not possess such an interest. While Lien and Yen might well be entitled to a share of the price established when Woo exercised his right of first refusal, (a point Lucky United, Shih, and Salvio Street concede on appeal) it is no longer subject to dispute that Lien and Yen do not possess an interest in the property itself." (*Id.* at p. 7.)

We also affirmed the order denying Shih and Lucky attorney fees. In doing so, we ruled that the original agreements between the parties were merged into the judgment in case number 305809, so "there was no longer a valid contractual [attorney's fees] provision" based on that original contract. (*Lien v. Lucky, supra,* A118698 at p. 10.)

C. *April 2009: The Parties' Present Lawsuit (487145)*

In April 2009, respondents Shih/Lucky filed the present lawsuit against Lien/Yen.[5] At issue in this appeal are the court's dismissal of Shih/Lucky's contract causes of action on demurrer and its dismissal of Lien/Yen's cross-complaint after trial.

1. *Shih/Lucky's Complaint*

Shih/Lucky's first cause of action sought an accounting. Their second and third causes of action alleged that Lien/Yen had breached the exercise contract by denying the effectiveness of Woo's exercise of his right of first refusal and the existence of the exercise contract that arose by his exercise, and by acting to block the sale of the property.

More specifically, the second cause of action alleged: "LIEN rejected and repudiated the bilateral contract that arose as a matter of law upon WOO's proper exercise of his right of first refusal on December 14, 1999, by letter of rejection; on January 6, 2000, by filing a seven-count cross-complaint based on the proposition that WOO had failed properly to exercise his right of first refusal; and again on and after the decision of the Court of Appeal entered on October 2, 2002," including continuing to litigate after remand in case number 305809, initiating case number 454501 in July 2006,

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[5] The parties also litigated in other proceedings. Those other cases are not directly germane to the matter at hand, so we briefly describe only some of them for context. In July 2006, Lien filed a malicious prosecution complaint against Lucky, Shih, and their attorney Eytan in superior court case number 454503, which was dismissed after a successful anti-SLAPP motion. In that same case, Lucky filed a cross-complaint for malicious prosecution against, inter alia, Lien and his attorney Lee. This cross-complaint was also dismissed in response to an anti-SLAPP motion. Lucky appealed the dismissal as to Lien, and we affirmed the order in *Lien v. Lucky United Properties Investment, Inc.* (2008) 163 Cal.App.4th 620. Lucky also appealed the dismissal as to Lee, but the appeal was dismissed. (*Lucky United Properties Investment, Inc. v. Lien* (Jun. 16, 2008, A119134 [app. dism.].) Lee then sought attorneys fees and costs against Lucky, which gave rise to another appeal and our published decision in *Lucky United Properties Inv., Inc. v. Lee* (2010) 185 Cal.App.4th 125. In yet another proceeding, Lee (Lien/Yen's attorney in case number 305809) asserted an ownership interest in the property in case number 455065, based on his fee agreement. The trial court rejected this claim, and we affirmed. (*Salvio Street LLC v. Lee* (July 29, 2010, A122408) [nonpub. opn.].)

and authorizing Lee to pursue a claim regarding his fee agreement. Shih/Lucky further asserted that the repudiation of Woo's exercise of the right of first refusal could be declared to be as late as January 8, 2003 (the date of remittitur of this court's October 2, 2002 decision). In addition, Shih/Lucky alleged that Lien/Yen's filing of lis pendens in case numbers 305809 and 454501 "hampered WOO's efforts to sell the property" and, "[a]s a result of LIEN's efforts, WOO was unable to sell the property until the trial on the merits concluded in Case Number 305809."

As to the third cause of action for declaratory relief, Shih/Lucky requested that, if their breach of contract claim were deemed time-barred, they could assert the claim as a set-off against any sum the court might eventually conclude Shih/Lucky owed to Lien/Yen as a result of Woo's exercise of his right of first refusal.

2. *Demurrers Sustained to Shih/Lucky's Contract Claims*

Lien/Yen filed a demurrer to the complaint, asserting among other things that the complaint failed to allege the elements required for an accounting cause of action, the second cause of action for breach of contract was time-barred and precluded by the collateral estoppel effect of the court's order sustaining the demurrer to the same claim in case number 454501, and the third cause of action for declaratory relief failed to state a cause of action.

In September 2009, the court (Judge Busch) overruled the demurrer as to the first cause of action for an accounting. The court sustained the demurrer without leave to amend as to the second cause of action for "breach of contract" and the third cause of action for "declaratory relief as to set-off for Lien's breach of contract," without prejudice to Shih/Lucky asserting the claim as a set-off against Lien/Yen's cross-complaint.

3. *Lien/Yen's Cross-Complaint*

In July 2009, Lien/Yen filed a cross-complaint against Shih/Lucky to compel payment of the amount owed under the exercise contract, contending that Woo breached the contract by failing to tender the exercise price after exercising his right of first refusal. Each of their two causes of action alleged breach of the exercise contract: the first cause

of action sought damages; the second sought payment of a percentage of the exercise price (or sales price) adjusted for set offs. According to Lien/Yen now, they filed the cross-complaint at this time because it became clear that Shih/Lucky were not going to honor their obligations under the exercise contract only when Shih/Lucky filed their complaint in this case instead of tendering the amount owed under the contract.

4. *Dismissal of Lien/Yen's Cross-Complaint*

The action went to trial in October 2010 (Judge Miller) as to Shih/Lucky's accounting cause of action and Lien/Yen's cross-complaint for breach of the exercise contract. The trial consisted of in limine motions and argument thereon, the submission and consideration by the court of documentary evidence, the taking of evidence by oral testimony of Lien, and briefing by the parties. As relevant here, Shih/Lucky moved in limine for judgment on the ground that Lien/Yen's cross-complaint was barred by the statute of limitations and res judicata. In response, Lien/Yen raised an equitable estoppel argument with respect to the statute of limitations.

At the trial, Lien testified that he did not sue for payment of the exercise price before filing the cross-complaint in this action because Woo and respondents caused him to believe that he would be paid when the "epic litigation" Woo started (case number 305809) was finished. On cross-examination, however, Lien acknowledged that he did not trust Woo, believed that Woo acted in bad faith, suspected that Woo would not pay, and thought Woo was "throwing smoke" at him with the letters demanding an accounting.

On May 4, 2011, the court issued a 23-page statement of decision. The court determined that Lien/Yen's claims were barred on the grounds of res judicata and the statute of limitations, explicitly rejecting Lien/Yen's equitable estoppel argument.

The court pronounced judgment that incorporated the earlier order sustaining the demurrer to Shih/Lucky's causes of action for breach of contract, dismissed Shih/Lucky's cause of action for an accounting as moot, and dismissed Lien's cross-complaint.

Lien/Yen filed a notice of appeal from the judgment on June 24, 2011. Shih/Lucky filed a notice of cross-appeal with respect to the order sustaining Lien's demurrer.

II. DISCUSSION

In this appeal, Lien/Yen contend the court erred in dismissing their cross-complaint, and Shih/Lucky contend the court erred in sustaining the demurrer to their breach of contract claims. We address the parties' contentions in turn.

A. *Dismissal of Lien/Yen's Cross-Complaint*

As mentioned, the trial court dismissed Lien/Yen's cross-complaint on the ground that their breach of contract claims were time-barred under Code of Civil Procedure section 337 and the ground they were precluded by res judicata. We must uphold the dismissal if either ground is supported. As it turns out, we need only address the statute of limitations.

Lien/Yen's causes of action in the cross-complaint allege that Woo breached the exercise contract (arising as a result of his exercise of his right of first refusal) by failing to pay or tender the exercise price. Lien/Yen did not allege specifically when this purported breach occurred, but they did allege that Woo exercised his right of first refusal in 1999. In deposition testimony submitted to the trial court, Lien asserted that Woo should have paid the amount when Woo opened escrow in June 2000. Moreover, in their trial brief and at trial, Lien/Yen's counsel confirmed that Lien/Yen were contending that Woo breached the exercise contract in June 2000.

A cause of action for breach of contract accrues at the time of breach, which then commences the limitations period. (*Cochran v. Cochran* (1997) 56 Cal.App.4th 1115, 1120.) The four-year limitations period of Code of Civil Procedure section 337 thus expired in June 2004. Lien/Yen's breach of contract claims, filed in July 2009, are time-barred.

Lien/Yen argue that the limitations period did not commence in 2000 upon Woo's breach, because Lien/Yen were entitled to rely on the contract and wait to see if Woo would cure the breach. For this proposition, Lien/Yen rely on a rule that states: "whether

the breach is anticipatory or not, when there are ongoing contractual obligations the plaintiff may elect to rely on the contract despite a breach, and the statute of limitations does not begin to run until the plaintiff has elected to treat the breach as terminating the contract." (*Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, 489 (*Romano*).)

Lien/Yen's argument is baseless. First, it is a bit odd for them to say that they were waiting to see if Woo was going to cure the breach of the exercise contract, since they were insisting through 2005 that Woo had not exercised his right of first refusal and, in any event, it was too late for Woo to pay. Second, the rule on which Lien/Yen rely is inapposite here. The rule applies to successive breaches of a *continuing* contractual obligation; it provides that the limitations period will not commence until the time for complete performance arrives, unless the plaintiff elects to treat an earlier failure to perform as a breach. (*Romano, supra*, 14 Cal.4th at pp. 489-490.) In this case, Lien/Yen alleged that Shih/Lucky failed to pay a single sum when it came due, not that they engaged in a series of successive or continuing breaches. Moreover, the time for complete performance came by June 2000 – as Lien/Yen told the trial court – and so by June 2000 Lien/Yen's causes of action accrued and the limitations period commenced. To apply the *Romano* rule as Lien/Yen urge would permit plaintiffs to extend (and thus evade) the limitations period altogether, by simply saying (as Lien/Yen do here) that they were continuing to wait for the other side to cure a purported breach until they filed their claims, no matter how many years had passed.

Lien/Yen next argue that the limitations period did not commence until December 2005, because they did not suffer harm from Woo's breach until the trial court's December 2005 decision that Woo's exercise was effective and an exercise contract had thereby formed. Before that, they explain, the trial court had ruled that Woo's exercise was *in*effective, and our October 2002 opinion reversing that order had remanded the matter to the trial court, thus leaving the issue undecided until December 2005. Lien/Yen's cross-complaint, filed in July 2009, was filed within four years of the December 2005 judgment.

Lien/Yen's argument is meritless. Lien/Yen were aware of Woo's attempt to exercise his right of first refusal, his contention that it created the exercise contract, and his failure to pay the exercise amount, in June 2000, the date they now allege Woo's obligation to pay came due. While the *legal significance* of Woo's acts was debated until December 2005, the *facts* underlying the cause of action for breach had all occurred years before.

Lastly, Lien/Yen argue that Shih/Lucky are equitably estopped from asserting the statute of limitations, because Woo, Shih, Lucky and their attorney Eytan represented that Lien/Yen would be paid under the exercise agreement. This argument is meritless too.

Equitable estoppel generally requires that: (1) the party to be estopped was apprised of the facts; (2) he intended for his conduct to be acted upon, or acted such that the party asserting the estoppel had a right to believe it was so intended; (3) the party asserting the estoppel was ignorant of the true facts; and (4) he relied upon the conduct to his injury. (*Driscoll v. City of Los Angeles* (1967) 67 Cal.2d 297, 305.) For equitable estoppel to preclude an affirmative defense based on the statute of limitations, the defendant's conduct must have actually and reasonably induced the plaintiff to forbear suing. (*Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 385.)

The trial court found that, because Lien testified that he did not trust Woo, Lien/Yen did not establish the reliance element of equitable estoppel. The court noted that "Lien must establish that Woo said or did something that caused Lien to 'believe it would not be necessary to file a lawsuit,' and that Lien reasonably relied on Woo's conduct and did not file the lawsuit." (CACI No. 456.) The court found that "Lien's testimony does not support the contentions that Woo misled him, or that Lien reasonably relied on Woo in forbearing to sue for breach because of assurances that Woo would perform under the contract," since "Lien's testimony was unequivocal that he did not trust Woo at all." Lien also "admitted in cross-examination that he did not know of any statement Woo made to him stating that Lien did not have to make a claim." The court concluded: "Given the entirety of Lien's testimony, and my observation of his demeanor while testifying that he unequivocally distrusted Woo, I am not persuaded by Lien's

testimony or any inference drawn from it [or from the documentary evidence] that he reasonably relied on the escrow instructions or the accounting letter or any statement or communication of Woo as a basis to forbear from bringing the claims in the current Cross-Complaint."

Substantial evidence supports the court's conclusion. There is no evidence that Woo, in saying he would pay what a court might order him to pay in the future, intended to induce Lien and Yen not to sue him for breach if he did not pay. Nor is there evidence that any of the other respondents had such an intent in making similar statements.[6] Furthermore, there was substantial evidence that Lien/Yen did not actually and reasonably rely on Woo's or respondents' statements in failing for years to assert any claim for breach of the exercise contract. Lien acknowledged at trial that he did not trust Woo, believed that Woo acted in bad faith, and suspected Woo would not pay.

Lien and Yen argue that their mistrust of Woo is not determinative, because they also relied on statements by his attorney Eytan, an officer of the court. In the so-called "accounting letter" of December 2005, Eytan sought Lien/Yen's agreement on certain accounting matters and stated: "After any appeal [of the judgment in case number 305809] is over, assuming plaintiffs [Woo/Lucky] prevail, plaintiffs expect to pay whatever sums the parties are due and owing, or whatever a court determines they owe."

Lien/Yen do not explain why an attorney's representation of what his client would do is a better candidate for reliance than the client's own representation of what he will do. If Lien/Yen did not trust Woo to pay despite his own representations that he would pay, it would be little comfort to hear Woo's attorney also say that Woo would pay. In this regard, Lien/Yen assert only summarily in their reply brief: "If counsel for defendants says 'My client will pay' it does not matter whether the client actually intends

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6 In asking the court to expunge the lis pendens Lien/Yen had recorded on the property, respondents asserted: "From the day of his exercise to the day of his death Woo never wavered from his resolve to pay whatever the Court ordered him to pay to implement his exercise. Today, his successor, the Woo Family 2000 Trust, reaffirms this commitment."

to pay. The statement is an enforceable promise. He can be forced to pay whether he intended to or not." However, they offer no legal authority for that proposition.

In any event, substantial evidence supports the conclusion that Woo's counsel's statements did not induce Lien/Yen to refrain from filing their claims in a timely manner. First, it was not unreasonable for the court to infer that Lien did not rely on Eytan's letter, since Lien testified that he believed Woo was "throwing smoke at him" in this letter and Lien never responded to it. Second, if Lien did rely on the statement, such reliance would not have reasonably led Lien/Yen to delay filing their claims. Eytan said that his client would pay "whatever sums the parties agree are due and owing, or whatever a court determines they owe" after any appeals from the December 2005 judgment were over. No appeal went forward from the December 2005 judgment, so sometime in 2006 it should have dawned on Lien/Yen that they should not continue to rely on Eytan's representation – or that they needed to get a court to determine what Woo owed. Third, any reliance on Eytan's statement would be immaterial anyway: Eytan made his statement in December 2005, after the limitations period had *already* run on Lien/Yen's claim alleging breach in June 2000, so it certainly did not cause Lien/Yen to miss the June 2004 deadline to file their claims. And, to the extent that Eytan's statement could be considered a *new* promise on behalf of Woo, Shih, or Lucky to pay (a question we need not and do not decide), Lien/Yen have not asserted a cause of action in this case based on that allegation.

Lien/Yen rely on an excerpt from *General Credit Corp. v. Pichel* (1975) 44 Cal.App.3d 844, which reads: "When the acknowledgement of a debt occurs before the expiration of the statute of limitations, California courts regard it as reaffirming and continuing the original debt; if the acknowledgement occurs after expiration, it gives rise to a new enforceable promise." (*Id*. at p. 848, fn. 3.) Here, however, there was never any "acknowledgement of a debt" before the limitations period expired. (*Ibid*.) And the statement in December 2005 was merely to the effect that Woo or his successors would pay whatever the court eventually ordered him to pay for implementing his exercise.

The court did not err in dismissing Lien/Yen's cross-complaint on the ground it was time-barred. Because this ground adequately supports the court's dismissal of the cross-complaint, we need not and do not address the alternative ground of res judicata.

B. *Dismissal of Shih/Lucky's Contract Claims*

Shih/Lucky alleged that Lien/Yen breached the exercise contract by denying its existence and by preventing the sale of the property for over six years after Woo's exercise of his right of first refusal in December 1999.[7] The trial court sustained Lien/Yen's demurrer to these second and third causes of action without leave to amend. Although the court did not specify the ground for sustaining the demurrer, Lien/Yen had based the demurrer on the statute of limitations and collateral estoppel. We must uphold the order if either ground is supported.

1. *Statute of Limitations*

Shih/Lucky's second and third causes of action, based on alleged breaches of contract, are subject to a four-year limitations period. (Code Civ. Proc., § 337.)[8] Shih/Lucky filed their complaint in April 2009. But by virtue of the parties' stipulation in case number 454501, the effective filing date for purposes of the statute of limitations is earlier.

As relevant here, the parties stipulated in case number 454501 as follows: "Lien waives statute of limitations or any other defenses based on the time interval between the dismissal of the cross-complaint and the filing of a new action, and agrees the new action by Woo will be treated by Lien as if the cross-complaint had been stayed rather than dismissed and as if the new action by Woo were identical in all material respects with the Woo cross-complaint." There is no dispute that the parties may waive or toll the

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[7] In their appellate briefs, Shih/Lucky represent that their causes of action alleged a breach of both the original contract between the parties and the exercise contract. In our reading, the complaint mentions the exercise contract only.

[8] The second cause of action is plainly for breach of contract; the third cause of action may be construed as a claim for declaratory relief based on the contract, and would have the same limitations period.

limitations period. (See, e.g., *County of Santa Clara v. Vargas* (1977) 71 Cal.App.3d 510, 520.)

According to the first phrase in this part of the stipulation, the effective filing date for Shih/Lucky's claims in this action is deemed to be the date of the dismissal of Shih/Lucky's cross-complaint in case number 454501 (June 2007). Based on the second phrase of the stipulation, however, the effective filing date would relate back to the *filing* of the cross-complaint in case number 454501 (September 2006), since Shih/Lucky's current claims are to be treated as the same as those in their prior cross-complaint. And, by operation of law, the filing date of Shih/Lucky's cross-complaint in case number 454501 relates back to the filing date of Lien/Yen's complaint in case number 454501 (July 25, 2006). (*Sidney v. Superior Court* (1988) 198 Cal.App.3d 710, 714-715.) Thus, the effective filing date of Shih/Lucky's complaint in this case is July 25, 2006.

Because the effective filing date of Shih/Lucky's complaint is July 25, 2006, the question is whether Shih/Lucky alleged a breach of contract accruing on or after July 25, 2002. (Code Civ. Proc. § 337.) Construing the allegations broadly as we must, we conclude they did.

In their complaint, Shih/Lucky allege that Lien/Yen breached by (1) repudiating Woo's exercise in December 1999, (2) filing their cross-complaint in case number 305809 in January 2000, by which they asserted that Woo had not properly exercised his right of first refusal, *and* (3) continuing efforts to block the sale of the property *after October 2, 2002* (when this court determined that Woo had properly exercised his right of first refusal), by filing lis pendens against the property and filing their complaint in case number 454501 in July 2006. It is undisputed that Lien recorded a notice of lis pendens against the property in November 2004 and it was not expunged until October 2005, and Shih/Lucky allege that the filing of the lis pendens hindered their ability to sell the property until the trial in case number 305809 was completed (December 2005). Based on these allegations, for purposes of a demurrer, it cannot be said that Shih/Lucky's allegations demonstrate that they have no breach of contract claim

within the limitations period: some of the alleged breaches occurred after July 2002 and thus within four years of the effective filing date of the complaint.

This result is consonant with the ostensible intent behind the parties' stipulation. At the time of the stipulation in case number 454501, the court had sustained a demurrer to Shih/Lucky's claim for anticipatory breach, but had *overruled* the demurrer as to Shih/Lucky's claim for actual breach. The stipulation was designed to maintain the status quo of Shih/Lucky's claims while Lien/Yen appealed the summary judgment entered on their complaint. Shih/Lucky's claims in this action are the same as, or at least incorporate, their claims for actual breach in case number 454501, and it cannot now be argued that their claims for actual breach are altogether untimely. Lien/Yen muster no substantial argument to the contrary.

The statute of limitations does not support the trial court's sustaining of the demurrer as to Shih/Lucky's second and third causes of action.[9]

2. *Collateral Estoppel*

Lien/Yen contend the demurrer to Shih/Lucky's causes of action in this case was properly sustained because of the collateral estoppel or res judicata effect of the order in case number 454501, which had sustained a demurrer to one of Shih/Lucky's contract causes of action. The argument is untenable.

In case number 454501, the court sustained Lien/Yen's demurrer as to Shih/Lucky's cause of action for *anticipatory* breach arising from Lien/Yen's repudiation of the exercise contract, based on anticipatory breach dates in December 1999, January 2000, May 2000, and June 2000. On the other hand, the court *overruled* Lien/Yen's demurrer as to Shih/Lucky's cause of action for actual breach. In other words, no demurrer was sustained as to breach of contract claims arising on and after

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9 Shih/Lucky argue further that the statute of limitations on a breach of contract claim is tolled while a related request for declaratory relief is being adjudicated. However, they did not raise this issue in opposing the demurrer to their complaint. Although they ask us to exercise our discretion to consider the matter as an issue of law on undisputed facts, we are not persuaded to accept the invitation. (*Ward v. Taggart* (1959) 51 Cal.2d 736, 742.)

October 2, 2002, as alleged in Shih/Lucky's current complaint. Accordingly, collateral estoppel does not apply.

Moreover, even if collateral estoppel (or even res judicata claim preclusion) would have otherwise barred Shih/Lucky's causes of action, Lien/Yen expressly waived their right to obtain dismissal on that ground. The parties' stipulation in case number 454501 stated: "Neither Woo nor Lien may claim . . . any res judicata or similar issue preclusive benefit in any further proceedings from the voluntary dismissal of the cross-complaint [of Shih/Lucky]." The point of the stipulation was to treat the filing of new claims by Shih/Lucky as a continuation of the claims they had asserted in case number 454501. Given these circumstances, res judicata claim preclusion and collateral estoppel issue preclusion do not apply.

3. *Failure to State a Cause of Action*

Lien/Yen urge that we should nonetheless affirm the dismissal of Shih/Lucky's contract claims, even if the grounds Lien/Yen asserted for the demurrer were inadequate, because the contract claims do not state a cognizable cause of action. Their argument is essentially this: the exercise contract has been established to be a unilateral contract, in light of our ruling in appeal number A118698 that Woo's exercise of his right of first refusal was sufficient to enable Lucky/Shih to sell the property to Salvio Street without Lien/Yen's formal conveyance of their interests; as the promisee in a unilateral contract, Lien/Yen had no promise to perform; and therefore Lien/Yen cannot be liable for breach of contract as a matter of law.

Lien/Yen's argument is incorrect. Although the exercise contract was unilateral in the sense that it did not require Lien/Yen to formally convey their interests, Lien/Yen still had a duty to comply with the covenant of good faith and fair dealing implied in every contract. (See, e.g., *Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 683.) A reasonable reading of Shih/Lucky's second cause of action is that Lien/Yen breached this implied covenant by the conduct alleged in the cause of action, including their post-July 2002 attempts to block the sale of the property. (See *Gherman v. Colburn* (1977) 72

Cal.App.3d 544, 564 [repudiation of an agreement may breach the covenant of good faith implied therein].)

While Shih/Lucky alleged that Lien/Yen "rejected and repudiated" the exercise contract and labeled the second cause of action as one for breach of contract rather than breach of the implied covenant of good faith and fair dealing, a breach of the covenant of good faith and fair dealing is, in fact, a breach of contract. (See *Habitat Trust for Wildlife, Inc. v. City of Rancho Cucamonga* (2009) 175 Cal.App.4th 1306, 1344.) In any event, the question on appeal from the sustaining of a demurrer is whether, on the facts alleged, *any* cause of action may be stated. Lien/Yen fail to establish that Shih/Lucky's complaint does not state a cause of action for breach of the implied covenant of good faith.[10]

In sum, none of the grounds asserted by Lien/Yen in their demurrer, and none of the arguments in their appellate briefs, supports the sustaining of the demurrer as to the second and third causes of action in Shih/Lucky's complaint.

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10 Lien/Yen spend a sentence on an argument that the litigation privilege bars Shih/Lucky's contract causes of action, citing *Feldman v. 1100 Park Lane Associates* (2008) 160 Cal.App.4th 1467, 1479-1481 (*Feldman*). The litigation privilege is generally invoked in the context of tort causes of action (except malicious prosecution), not contract claims. (See *Navellier v. Sletten* (2003) 106 Cal.App.4th 763, 773; *Rubin v. Green* (1993) 4 Cal.4th 1187, 1193-1194.) The privilege has, however, been applied to contract claims on occasion. (See *Feldman*, *supra*, 160 Cal.App.4th at pp. 1494-1498.) The question is whether the application of the privilege would further the policies underlying the privilege, which include affording litigants and witnesses free access to the courts without fear of harassment, and avoiding " 'unending litigation.' " (*Id*. at pp. 1496-1498.) While many might conclude that the parties' serial litigation has indeed seemed "unending," the matter is muddied by the fact that Lien/Yen expressly stipulated in case number 454501 that Shih/Lucky *could* bring their contract claims in a new action – the one before us. This circumstance, along with Lien/Yen's cursory treatment of the matter and the fact that they did not raise the issue in the trial court, persuade us that the sustaining of the demurrer cannot be upheld on the basis of the litigation privilege. However, nothing herein precludes Lien/Yen from asserting the litigation privilege as a defense to Shih/Lucky's causes of action after remand, and we express no opinion on the merits of such a defense.

We must, however, add a postscript in regard to the third cause of action for declaratory relief. Shih/Lucky's third cause of action sought an order that their breach of contract claim, if time-barred, be used as a set-off against any amount Lien/Yen might recover as a result of Woo's exercise of his right of first refusal. Although we conclude that the second cause of action is not time-barred based on the alleged breach dates after July 2002, it would be time-barred as to the alleged breach dates before July 2002, and to that extent the third cause of action would conceivably come into play. On the other hand, while the trial court sustained the demurrer to this cause of action, it did so without prejudice to Shih/Lucky asserting the claim as a set-off against Lien/Yen's cross-complaint, which in effect allows Shih/Lucky to do what they wanted under the third cause of action. We therefore find no prejudicial error in the trial court's sustaining the demurrer as to this third cause of action.

C. *Adjustments to the Judgment*

In light of our rulings in this appeal, we must revise the judgment as follows.

As stated *ante*, the court erred in sustaining the demurrer to Shih/Lucky's second cause of action (although, as explained *ante*, the cause of action is for breach of the implied covenant of good faith and may proceed only as to breaches allegedly occurring on or after July 25, 2002). The second cause of action must therefore be reinstated.

As also explained *ante*, the court did not err in dismissing Lien/Yen's cross-complaint. And, because Lien/Yen's cross-complaint is dismissed, Shih/Lucky's third cause of action for declaratory relief – as well as Shih/Lucky's first cause of action for an accounting – is now moot: these causes of action sought an offset against any amounts Shih/Lucky might owe to Lien/Yen, but since Lien/Yen cannot recover on their cross-complaint, there is nothing to set-off.

III. DISPOSITION

The judgment is reversed as to Shih/Lucky's complaint and affirmed as to Lien/Yen's cross-complaint. The matter is remanded for further proceedings on the second cause of action of Shih/Lucky's complaint, consistent with this opinion. The first

and third causes of action of Shih/Lucky's complaint are dismissed as moot. Each party shall bear its own costs on appeal.

NEEDHAM, J.

We concur.

SIMONS, Acting P. J.

BRUINIERS, J.